

Supreme Court, U. S.
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IN THE
**SUPREME COURT
OF THE UNITED STATES**

OCTOBER TERM, 1978

NO. 78-110

SHEARN MOODY, JR.,
Petitioner,

VS.

STATE OF ALABAMA, EX REL. CHARLES H. PAYNE,
Commissioner of Insurance and Receiver of Empire
Life Insurance Co., of America
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF
CERTIORARI TO THE SUPREME COURT OF THE
STATE OF ALABAMA

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RELATED LITIGATION

The opinion of the Supreme Court of Alabama is
reported at Ala, 355 So. 2d 1116.

Related Court decisions are:

Moody v. State, ex rel Payne, 295 Ala. 299, 329 So. 2d 73
(1976);

Moody v. State, ex rel Payne, Ala., 351 So. 2d 547 (1977);

Moody v. State, ex rel Payne, Ala., 351 So. 2d 552 (1977);

Moody v. State, ex rel Payne, 520 S.W. 2d 452
(Tex. Civ. App. - Austin 1975);

Empire Life Ins. Co. v. State, 492 S.W. 2d 366
(Tex. Civ. App. - Austin 1973);

Moody v. Crook, 420 S.W. 2d 958 (Tex. Civ. App. Austin
1975);

Moody v. Jones, 518 S.W. 2d 536 (Tex. Civ. App. Austin
1975);

Day v. Jones, 489 S.W. 2d 368 (Tex. Civ. App. - Austin
1972, n.r.e.);*

Moody v. Moody Nat'l Bank, 522 S.W. 2d 710
(Tex. Civ. App. - Galveston 1975, n.r.e.);

Moody v. Texas, 538 S.W. 2d 158 (Tex. Civ. App. - Waco
1976 writ ref'd n.r.e. 1977).

*Indicates denial of review by the Texas Supreme
Court upon finding of "no reversible error" (n.r.e.).

Other petitions of related cases reaching this Court are:

No. 77-428 (denied December 12, 1977, rehearing
denied February 21, 1978)

No. 76-1845 (denied October 3, 1977, rehearing denied
November 28, 1977)

No. 77-873 (denied)

No. 77-571 (denied December 12, 1977, rehearing
denied January 16, 1978)

No. 77-1041 (denied April 17, 1978)

No. 77-1109 (denied April 17, 1978)

QUESTION PRESENTED

May Petitioner raise an issue for the first time on Petition for Writ of Certiorari in the United States Supreme Court?

STATEMENT OF THE CASE

1. Background of Receivership.

On June 29, 1972, Empire Life Insurance Company of America (Empire) was found to be impaired and insolvent and placed in Receivership by the Circuit Court of Jefferson County, Alabama. Empire was also placed in ancillary receivership in the States of Arkansas, Montana and Texas. The president, chairman of the board of directors and principal stockholder of Empire was Shearn Moody, Jr., (Moody).

Following an extensive hearing in which Moody was represented as a party litigant, the receivership court determined Empire to be impaired in excess of ten million dollars, insolvent in excess of six million dollars and ordered the Company liquidated and the active insurance business reinsured into Protective Life Insurance Company. This case was upheld in *Moody v. State, ex rel Payne*, Ala., 344 So. 2d 160, (1977) cert denied *Shearn Moody, Jr., v. Charles H. Payne, etc.*, U.S., (Case No. 77-428).

2. Background of Injunction.

The facts leading up to the January 6, 1975 order of the trial court enjoining Moody are best stated by the Supreme Court of Alabama speaking through Mr. Justice Merrill in *Moody v. State, ex rel Payne*, 295 Ala. 299 (pp 302-304), 329 So. 2d 73 (1976). A shorthand rendition of those facts are as follows:

On December 27, 1974, the Receiver of Empire, Commissioner of Insurance, John G. Bookout, applied for and received a temporary restraining order against Moody and others. To supplement the application, Bookout attached affidavits concerning the multiplicity of litigation instituted by Moody following the court devaluation of Empire's principal asset and the order of liquidation and reinsurance. A hearing on that application was set for January 6, 1975.

At the hearing on January 6, 1975, Commissioner Bookout testified that he had been subjected, both as Receiver of Empire and individually, to numerous law suits and proceedings filed by Moody or Moody Attorneys all of which related to the Empire receivership and were filed subsequent to the plenary hearing conducted by the receivership court in April of 1974 culminating in an order of insolvency and reinsurance on June 14, 1974. Bookout also testified in detail as to some seven separate actions then pending or filed by Moody or instituted by Moody.

Commissioner Bookout further testified as to a threat made by Shearn Moody in the following terms:

"(Shearn Moody) said to me, in words to this effect, Mr. Bookout, we are just getting started on you.

I intend to sue you personally. My actions will be of a personal nature against you to carry over after you have left the office (of Commissioner of Insurance).
***we killed Crawford Martin and somebody else,
***he died with a heart attack the day after he signed his deposition, and we are beginning on you, and we are going to keep on if it takes us fifty years." (295 Ala. 304)

Following the hearing, the Court issued an order restraining Moody and others from filing any lawsuit,

complaint, legal claim or amendment thereto which related to the receivership of Empire Life Insurance Company of America without prior approval of the receivership court. This injunction was upheld by the Supreme Court of Alabama in *Moody v. State, ex rel payne*, supra. See also, *Ex parte Moody*, Ala., 351 So. 2d 538 (1977). Note also Title 28A, Section 624 (2) Code of Alabama Recompiled 1958 (Section 27-32-5, Code of Alabama 1975).

3. Present Litigation.

This proceeding arises out of a petition by Charles H. Payne as Receiver of Empire against Moody for damages suffered by the receivership estate as a result of the willful disobedience of the injunction issued January 6, 1975. As a part of that injunction, Mr. Moody was restrained by the trial court from filing any amended complaint in that action initiated by him in the United State District Court for the Middle District of Alabama entitled *Allmon v. Bookout*, Civil Action Number 74-377-N.

Following the injunction of January 6, 1975, Moody took an extraordinary appeal to the State Supreme Court. The extraordinary proceedings were denied on January 27, 1975. On the very next day, January 28, 1975, Moody, in open defiance of the courts, filed an amended complaint in the *Allmon* case. Thereafter, on petition of the aggrieved parties, Moody was ordered to show cause why he should not be held in contempt. A hearing was held before the trial court resulting in an order finding Moody in contempt of court. This order on review of the Supreme Court of Alabama resulted in a direction to the trial court to specify in detail what actions were required of Moody to purge himself of contempt. As a result of that order, the trial court entered an order April 30, 1975, detailing the findings of contempt and detailing the actions required by Moody to purge himself of this contempt.

A hearing was set for May 19, 1975, which thereafter was continued from time to time due to the continuation of the *Allmon* proceeding in the United States District Court and in the Fifth Circuit Court of Appeals. No appeal was taken by Moody from the order of April 30, 1975. An appeal, however, was taken from the order of January 6th, resulting in the Supreme Court decision reported in *Moody v. State, ex rel Payne*, 295 Ala. 299, 329 So. 2d 73.

On June 5, 1975, the Receiver of Empire filed a motion for damages to be assessed against Moody in favor of the receivership estate resulting from Moody's willful violation of the order of the trial court of January 6th. This motion was also continued by the court from time to time.

On final determination of the *Allmon* action by the United States District Court in May, 1976, the trial court on June 16, 1976, ordered Moody to appear July 19, 1976, to demonstrate that he had purged himself of civil contempt and fully complied with the April 30th order. A hearing was held on July 19, 1976 at which time Moody was represented by counsel. This hearing proceeded on the issues of whether Moody had purged himself and resulted in a determination by the Court rendered November 1, 1976 finding that Moody had failed to comply with the order and was still in civil contempt. A separate appeal was taken from that order by Moody.

Following the hearing of July 19, 1976, the Receiver of Empire of July 20, 1976, filed the amended petition for damages to be assessed against Moody as a result of his continuing, willful violation of the order of January 6, 1975. Moody's response was filed, together with a request for jury trial. A jury was impaneled and trial began on November 29, 1976. The jury returned a verdict assessing punitive damages in the amount of Fifty Thousand Dollars (\$50,000.00) and compensatory damages in the

equal amount of Fifty Thousand Dollars (\$50,000.00). After remittitur, the compensatory damages were reduced to Eighteen Thousand One Hundred Fifteen Dollars and Seventy Eight Cents (\$18,115.78).

Protective Life Insurance Company also filed a petition for damages which was tried before the trial court without a jury. These two cases were consolidated on appeal in view of the controlling question raised in both cases by Moody concerning whether a party who sustains damages as a result of another's contemptuous acts may recover for his damages without instituting a separate action.

ARGUMENT

I. THE UNITED STATES SUPREME COURT WILL NOT UNDERTAKE TO REVIEW WHAT THE COURT BELOW DID NOT DECIDE.

Moody directs his entire petition to the principle that the Alabama state court injunction of January 6, 1975, and the civil contempt judgments based thereon are in direct conflict with the legal and constitutional principles enunciated by this court in *Donovan v. City of Dallas*, 377 U.S. 408 (1964) and *General Atomic v. Felter*, U.S. , 98 S. Ct. 76 (1977).

On page nineteen of Moody's brief, there appears the following statement:

"Although the *Donovan* principle was again raised by petitioner in the civil contempt judgment cases, which are the subject of the case at bench, the Alabama Supreme Court ignored the *Donovan* issue in its written Opinion and, instead, addressed itself solely to other unrelated issues."

The Rules of Appellate Procedure for Alabama are similar to those of the United States Fifth Circuit Court of Appeals as well as the rules of this Court and require under Rule 28, a table of contents, a statement of the case, a statement of the issues presented for review, a full statement of facts and an argument. All issues presented by the Appellant appear in the statement of issues.

In the instant case on appeal to the Supreme Court of Alabama, Moody filed two briefs, one on the 24th day of June stating all of his issues and citations of authority and the second on August 18, 1977, in the nature of a reply

brief to the brief of the Appellees. A copy of the briefs is available for the Court on request. Moody neither raised the *Donovan* principle as an issue nor did Moody even cite the *Donovan* case as an authority.

The *Donovan* principle not only was not raised in the Supreme Court of Alabama, it further was not raised in the trial court on the trial of these issues.

This Court has previously held in *Walters v. City of St. Louis, Mo.*, 347 U.S. 231, (1954):

"Of course, we will not undertake to review what the court below did not decide. The state court has not passed on any question of discrimination arising from the regulations or any question as to the interpretation or validity thereof."

See also *City of Eastlake v. Forest City Enterprises, Inc.*, U.S. , 96 S. Ct. 2358 (1976).

II. DOCTRINE OF CONCURRENT JURISDICTION-THE EXCEPTION

Even if Moody could raise the *Donovan* issue at this point, the issue is not applicable to this case.

The *Allmon* case, for which Moody was found in contempt, resulting in the damages assessed in this case, was first filed on November 22, 1974. As a result of this and numerous other actions brought by Moody, who was also a party to the receivership proceedings, the trial court on petition of the receiver issued its injunction of January 6, 1975. Following the Supreme Court's denial of review on January 27, 1975, Moody, in open defiance, filed his amended complaint in the *Allmon* action directly attacking every part of the receivership proceeding.

Though, entitled a civil rights action (no issue of antitrust was raised, contrary to assertions of the petitioner), the case attempted merely to use the vehicle of civil rights to relitigate the entire receivership proceedings and wrest the control of the res from the receiver and the receivership court. The United States District Court for the Middle District of Alabama looked beyond the claim of civil rights to the purpose of the litigation and declined to interfere with the receivership court's control of the estate.

The leading case on the subject of concurrent jurisdiction of the state and federal judiciary is that of *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 452 (1938). This Court, after reviewing the problems of concurrent jurisdictions of the Supreme Court of Pennsylvania and the United States District Court, held:

"...it is settled that where the judgment sought is strictly in personam both the state court and the federal court having concurrent jurisdiction may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other. On the other hand, if the two suits are in rem, or quasi in rem, so that the court, or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought, the jurisdiction of the one court must yield to that of the other. We have said the "the principle applicable to both federal and state courts that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted, but applies as well where courts are brought to marshal assets, administer trusts, or liquidate estates, and in suits of similar nature where, to give effect to its jurisdiction, the

court must control the property." (305 U.S. 280) (emphasis supplied)

A similar case is that of *Hutchins v. Pacific Mutual Life Insurance Company*, 20 F. Supp. 150 (S.D. Cal. 1937) affirmed 97 F. 2d 58 (9th Cir. 1938). In that case, prior to any suit being filed in federal court, the state court vested title of all of the assets of an insolvent domestic insurance company in the Insurance Commissioner of California pursuant to his petition. Subsequently, pursuant to petition of the Insurance Commissioner, the court approved liquidation of the insolvent company on the grounds that conservation was futile. The Commissioner filed a plan of reorganization whereby a new insurance company was to acquire the assets of the insolvent company. The plan, after approval by the state, was fully executed.

Thereafter, suit was brought in federal court seeking reconveyance of the assets on the grounds that the entire state proceeding was fraudulent and therefore the state court lacked jurisdiction. The district court in dismissing the federal action stated:

"This action, and the one in the state courts are actions in rem, or at least, quasi in rem. *The relief sought is primarily concerned with the assets in question.* The rule in such cases is that *the court first acquiring jurisdiction of the res has exclusive jurisdiction.*" (20 F. Supp. 152) (emphasis supplied)

Donovan v. City of Dallas, 377 U.S. 408 (1964) does not change the rules set forth in *Princess Lida* and *Hutchins*, supra but recognizes the exception where a court has custody of property, that is proceedings in rem or quasi in rem.

General Atomic v. Felter, 434 U.S. , 98 S. Ct. 76 (1977) did not deal with an in rem or quasi in rem situation.

Rather, in that case, this Court reversed the New Mexico Supreme Court in its conclusion that *Donovan*, supra, precluded state courts only from enjoining litigants from proceeding further with federal suits in which jurisdiction has already attached at the time of the issuance of the injunction.

The mere assertion by Moody that his "civil rights" action in *Allmon v. Bookout* was an in personam action does not make it such. The United States District Court for the Middle District of Alabama did not agree with Moody. The Alabama Supreme Court did not agree with Moody and there is no reason for any other person to agree with Moody on this issue. The entire thrust of *Allmon* was to wrest control of the receivership estate from the state court and retry all of the issues previously litigated using the civil rights statute as a vehicle for federal jurisdiction.

Other cases cited by the Petitioner are so far afield from the subject matter of this case as to not merit discussion.

CONCLUSION

Once again Moody seeks to review the injunction issued by the Circuit Court of Jefferson County, Alabama on January 6th, 1975. That injunction has previously been reviewed on numerous occasions, both by the Supreme Court of Alabama and by this Court. The most recent review being *Shearn Moody, Jr., v. State of Alabama, ex rel Charles H. Payne, etc.*, (77-1109, cert. denied April 17th, 1978).

The facts of this case, however, do not merit another review of that injunction. On the trial of the case at bar, i.e. the issue of damages, Moody never once raised the issue of whether the *Allmon* action was in personam as opposed to in rem. He never once in this proceeding raised the issue of whether the injunction should be held applicable to the *Allmon* case on federal constitutional grounds as expressed in the *Donovan* case, supra. Having failed to raise the issue in the state court, Respondent insists that Moody cannot now for the first time raise the issue on petition for certiorari.

Even if Moody perchance could raise that issue in this Court, the mere statement by Moody that the *Allmon* case was an in personam action because it was purportedly brought under the civil rights statute does not necessarily make it true. The United States District Court, citing *Princess Lida* and *Hutchins*, supra, as authority, denied Moody's contention. There is no reason for this Court now at this late date, in this proceeding, to review that decision. For these reasons, the petition should be denied.

RESPECTFULLY SUBMITTED:

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PROOF OF SERVICE

Proof of Service of three copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari upon all parties separately represented by Counsel was filed by James W. Webb, a member of the bar of the United States Supreme Court, with the Clerk of the United States Supreme Court of the same date the Brief in Opposition was filed.